and see 2 COLUMBIA LAW REVIEW, 383. It would be a more logical result, certainly, to say that where a man's right of user, of exclusion or of disposition over a thing, whether land, business or anything else, corporeal or incorporeal, is taken away or destroyed under Eminent Domain, such person should have "just compensation" under the Constitution in every case where he would have had an action for damages against a private person under the common law.

CARRIER'S DUTY TOWARDS PASSENGERS AND LICENSEES.—A recent Texas case, *Houston & Texas Central R. Co.* v. *Phillis* (1902) 69 S. W. 994 raises an interesting question. The plaintiff and his wife were assaulted by a drunken man, who was allowed to come into the defendant's depot. The wife had purchased a ticket and was waiting for a train. The husband was acting as escort and had no intention of becoming a passenger. It was held that the wife was a passenger, and as such, had a cause of action, but that the husband being a mere licensee had no right of action.

It might, with some show of reason, be said that the carrier in the exercise of its public calling, owes a duty to all those who are lawfully in the station, whether passengers or licensees. But the rule which requires a passenger carrier to protect against injuries by third persons has obviously no parallel and no origin in the law of tort. It is a comparatively recent application of the ancient duty to safeguard the passenger. *R. Co.* v. *Burke* (1876) 53 Miss. 200; *Britton* v. *Ry* (1883) 88 N. C. 536. It is paralleled only by the duty imposed upon the carrier of protecting its passengers from wanton assaults by its servants, whether the acts are within the apparent scope of authority or not. See 2 COLUMBIA LAW REVIEW, 488. It is no light responsibility, and should not be lightly imposed. The mere fact that the railroad is a carrier of passengers has not been considered a ground for extending its liability to the general public, beyond that of the innkeeper or the man who keeps a shop. The extraordinary duties of the carrier are those owed to passengers, and, unless the dual relation of passenger and carrier exists, one must agree with the result reached in the principal case as far as the rights of the husband are concerned.

The adoption of this test as a working rule, however, is not without its difficulties. It raises the perplexing question of defining the term passenger. Nor have judicial dicta thrown much light on the subject. In the majority of cases, it would make not the slightest difference in the result reached, whether the person seeking redress were a passenger or a licensee. The carrier like the innkeeper or shopkeeper, is under a duty to keep its premises in safe condition. Where the cause of action arises from a failure to perform this duty, it matters not that the plaintiff is a passenger, and to call him such is entirely obiter. The analogy between freight and passengers, which is sometimes attempted, *Webster* v. *Fitchburg R. Co.* (1894) 161 Mass. 298, is in some degree helpful. In the case cited it is said: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, and

so the existence of the relation of passenger and carrier, is commonly to be implied from circumstances." Mr. Hutchinson in his work on Carriers (2d ed. sec. 562) after adverting to the fact that mere intention to become a passenger does not suffice, states the rule thus, "But if the intention and the act of the party combined are such as to give rise to an implied contract to carry, the duty and obligation of the carrier as such at once begin." This is merely a different way of stating the rule as laid down in the *Webster* case (*supra*), for to imply a contract in fact is to assume from the facts that the carrier had accepted the passenger.

In Kentucky a statute provides that all railroad companies shall open their ticket offices and waiting-rooms for the passengers at least thirty minutes before the schedule time for the departure of trains. A recent case in that jurisdiction decides that an acceptance will not be presumed before that time, and that where a person is injured by third parties in the depot three hours before train time the carrier is not liable, *Ill. Cent. R. Co.* v. *Laloge* (Ky., 1902) 69 S. W. 795. The same result was reached in *Phillips* v. *Southern R. Co.* (1899) 124 N. C. 123, where a rule of the company required its waiting-rooms at a station to be closed until thirty minutes before the departure of the next train.

In the principal case the facts justify the conclusion reached by the court that the wife was a passenger. Her right to recover was therefore well recognized. And since this extraordinary duty of protection against third persons, has been imposed only in favor of passengers, or at least those who have lawful business with the carrier as such—see *Daniel* v. *R. Co.* (1895) 117 N. C. 592—the further conclusion that the husband could not recover, must also be considered warranted.

AN AGENT'S LIABILITY IN TORT TO THIRD PERSONS FOR NONFEASANCE.—The case of *Lough* v. *Davis* (Wash. 1902) 70 Pac. 491, raises the question whether the nonfeasance of an agent toward his principal may also be such a nonfeasance toward a third person damaged thereby as to make him liable in tort to that third person. The ordinary rule that runs through the books seems to answer in the negative. It is said that an agent is liable in tort to third persons for misfeasance but not for nonfeasance. COKE, as counsel, suggested the distinction in *Marsh* v. *Astry* (1590) Cro. Eliz. 175, in a case where an under-sheriff failed to return a writ, but the court did not pass on its validity. Lord HOLT'S dictum in *Lane* v. *Cotton* (1701) 12 Mod. 472, 488, that a post office clerk would not be liable to a third person for failure to act, or nonfeasance, but would be for an improper act, or misfeasance, is the origin of the rule. The natural implication of this is that while a clerk would be liable if he lost a letter by carelessly knocking it into a waste box, he would not be if the wind blew it there and he failed to take the trouble to pick it out. Lord MANSFIELD in *Whitfield* v. *Lord Le Despencer* (1778) 2 Cowp. 754, 765, speaks of the responsibility of the clerk for the loss of letters without drawing any distinction between misfeasance and nonfeasance. It was Justice STORY'S repetition of Lord HOLT'S statement of the law that seems to have given it its wide currency. Story on Agency